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SERVICE DATE - NOVEMBER 14, 2000

## SURFACE TRANSPORTATION BOARD

### DECISION

Docket No. AB-33 (Sub-No. 70)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—WALLACE BRANCH, ID

Decided: November 13, 2000

By decision and certificate of interim trail use or abandonment (CITU) served on June 26, 2000 (June Decision),<sup>1</sup> the Board gave final approval to the Union Pacific Railroad Company (UP) to salvage its 71.5-mile Wallace Branch rail line in Benewah, Kootenai, and Shoshone Counties, ID, subject to four environmental conditions and other terms and conditions.<sup>2</sup> The Board also authorized the railroad to negotiate an interim trail use agreement with the State of Idaho and the Coeur d'Alene Tribe pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). This decision denies a petition to reopen, claiming that the June Decision contains material error.

### BACKGROUND

On July 19, 2000, Citizens Against Rails-to-Trails (CART), a coalition of Idaho landowners, filed a petition to reopen the June Decision and on July 21, 2000, filed a petition to stay the effective date of that decision pending disposition of its petition. On July 25, 2000, UP

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<sup>1</sup> Pending judicial review in Citizens Against Rails-to-Trails v. STB, No. 00-1387 (D.C. Cir. filed Sept. 5, 2000).

<sup>2</sup> We will not recount the extensive history of this abandonment proceeding, which began in 1991 and includes a prior court review and a subsequent reopening to complete the analysis of environmental issues. Briefly, during the course of the Interstate Commerce Commission's proceeding, the entire right-of-way of the Wallace Branch line was found to be contaminated with heavy metal concentrates. This raised serious environmental concerns, especially with regard to salvage of the branch line. In State of Idaho et al. v. ICC, 35 F.3d 585 (D.C. Cir. 1994) (State of Idaho), the court remanded the ICC's conditional authorization of salvage. UP's salvage proposal then was the subject of a lengthy and exhaustive environmental review, as detailed in the June Decision. We note that, subsequent to the issuance of the June Decision, the section 106 process of the National Historic Preservation Act was completed. Therefore, the Board removed the historic preservation condition imposed in the June Decision by decision served September 27, 2000.

replied to CART's petitions. In a decision served July 25, 2000 (the Stay Denial), Chairman Morgan rejected CART's stay petition.<sup>3</sup> The June Decision became effective on July 26, 2000.

In its petition to reopen, petitioner argues that: (1) the issuance of a CITU in this case is not merely ministerial but is a major Federal action that requires an assessment of its environmental impacts; (2) the Board failed to take the hard look at environmental issues required by the court in State of Idaho and improperly delegated its responsibilities to examine the environmental impacts of salvage of the line; and (3) the Trails Act is inapplicable to this case because the right-of-way is contaminated, precluding its safe use as a trail and for rail banking.<sup>4</sup> UP replies that the substantive issues raised in CART's petitions were fully considered and properly rejected by the Board in the June Decision.

### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1152.25(e)(4), a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. CART's claim of material error lacks merit. We agree with UP that CART continues to raise the same arguments here that we have already thoroughly addressed and properly rejected.<sup>5</sup> As explained in the June Decision and the Stay Denial, CART's argument that the issuance of a CITU requires the preparation of an environmental assessment or environmental impact statement has been consistently rejected by this agency, and by our predecessor, the ICC, whose position has been upheld by the courts. Goos v. ICC, 911 F.2d

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<sup>3</sup> The Chairman's decision found that the standards governing a stay had not been met, that the stay petition was untimely, and that CART was not likely to prevail on the merits of its petition to reopen.

<sup>4</sup> CART also suggests that this abandonment already has been consummated, precluding interim trail use. But in State of Idaho, the court remanded the ICC's conditional authorization of salvage, and the ICC then reopened that portion of the case. Thus, it was entirely appropriate to consider CITU requests in the June Decision.

<sup>5</sup> For example, CART reiterates its claims, previously addressed and rejected, that the environmental analysis of abandonment and salvage cannot be separated from the environmental implications of potential conversion of the right-of-way into a recreational trail. CART also continues to suggest that the right-of-way corridor cannot be used as a trail because of the alleged environmental hazards on and adjacent to the right-of-way corridor, a claim we have already denied. CART raised these same arguments during the comment period on the Consent Decree lodged by the government plaintiffs with the United States District Court of Idaho in United States & State of Idaho v. UP, No. CV 99-0606-N-EJL, and Coeur d'Alene Tribe v. UP, No. CV 91-0342-N-EJL. Plaintiffs in those proceedings (the United States, State of Idaho, and Coeur d'Alene Tribe) found CART's claims meritless. See UP's Update, filed September 21, 2000.

1283 (8th Cir. 1990) (Goos). CART's repeated claims that the instant case is distinguishable are unpersuasive. See June Decision at 10-12 (making it clear that, in conducting environmental review in abandonment cases, the Board's role is limited to the anticipated impacts of the abandonment proposal and that, given the Board's limited, ministerial role under the Trails Act, questions related to whether and how this right-of-way should be used as a trail are not matters for the Board's consideration).

Here, as in every Trails Act case, the Board issued a CITU because the trail sponsors had submitted a joint statement of willingness to assume financial responsibility for the right-of-way, and acknowledged that use of the right-of-way is subject to possible future reactivation of rail service in compliance with 49 CFR 1152.29 – thereby satisfying the statutory criteria – and UP had agreed to negotiate. The fact that the Environmental Protection Agency (EPA) and other agencies and entities have been involved in considering appropriate response actions and reaching an agreement with UP in the Consent Decree process that contemplates interim trail use does not alter our ministerial function in issuing Trails Act authority here. As the court found in Goos, Congress in 16 U.S.C. 1247(d) gave the Board little, if any, discretion in Trails Act matters as long as the statutory requirements in 16 U.S.C. 1247(d) are satisfied, as they clearly were in this case.

CART's argument that the Board failed to adequately examine the environmental impacts of salvage of the line is belied by the Supplemental Environmental Assessment prepared by the Section of Environmental Analysis (SEA) and by the June Decision. The potential environmental effects of salvage have been thoroughly addressed through SEA's and the Board's independent review of all of the information (including a detailed Track Salvage Plan) submitted by UP, various agencies (including EPA and others with specialized expertise), as well as members of the general public.<sup>6</sup> As explained in the June Decision, at 9-11, SEA and the Board have addressed the concerns expressed by the court in State of Idaho. CART cites no authority to support its argument that the Board should have ignored the expertise and information of EPA and the other agencies and entities to redo or duplicate the work of agencies and others with specialized expertise.

Finally, CART's argument that the Trails Act is inapplicable to this case because the right-of-way is contaminated lacks merit. As explained in the June Decision, there has been extensive environmental analysis of this right-of-way. The implications of preparing the land for possible conversion to interim trail use – and the most appropriate way to salvage this line – have been thoroughly assessed by EPA and others through the Streamlined Risk Assessment performed as part of the Engineering Evaluation and Cost Analysis (EE/CA) and Consent Decree

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<sup>6</sup> EPA, the Department of Justice, the Department of the Interior, the State of Idaho, the Coeur d'Alene Tribe, and UP all supported our approach in this proceeding on remand and urged that we authorize salvage and issue the CITU based on the record presented.

process.<sup>7</sup> Moreover, those agencies will oversee UP's salvage and response activities during the salvage process and the contemplated conversion to interim trail use. CART offers no support for its contention that the potential future reactivation of the corridor for rail use requires environmental analysis now.<sup>8</sup>

In short, the record here shows that, over the last 6 years, the potential environmental impacts of salvage have been thoroughly explored. As detailed in the June Decision, if the actions UP would be required to take under the EE/CA, the Track Salvage Plan, and the Biological Assessment are implemented, along with the additional mitigation the Board imposed, UP's proposal to salvage the line would not have significant adverse environmental impacts. Moreover, as SEA concluded, the "no action alternative" – leaving the track in place – is not a permanent solution and likely would be worse from an environmental standpoint than authorizing salvage. In these circumstances, CART's petition to reopen this matter is without merit and will be denied.<sup>9</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>7</sup> By a pleading filed September 12, 2000, we were notified by UP that the Consent Decree was approved and entered as a judgment of the court on August 25, 2000. As detailed in footnote 11 to the June Decision, this decree obligates UP to take certain actions in compliance with applicable environmental laws, and to transfer the right-of-way to the Tribe and the State for interim trail use under the Trails Act.

<sup>8</sup> Indeed, if railroad service is reactivated on the Wallace Branch in the future, the right-of-way will be cleaner than it was when rail service ceased, because of the response actions that will be undertaken under the EE/CA and Consent Decree process.

<sup>9</sup> We note that we also could have rejected CART's petition to reopen as untimely when it was originally filed. As explained in the Stay Denial, if a petitioner wishes to have its petition for reopening considered by the Board before an abandonment authorization takes effect, it must file its petition for stay along with its petition for reopening no later than 15 days after service of the decision authorizing abandonment. 49 CFR 1152.25(e)(2)(i) and (e)(7)(ii). CART's petition for reopening was not filed until July 19, 2000, and its petition for stay was not filed until Friday, July 21, 2000, some 10 days after its due date.

It is ordered:

1. CART's petition to reopen is denied.
2. This decision is effective December 14, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary